89-2018

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JON G. MURRAY, ET AL.,
. . . . . Petitioners,

v.

TRAVIS COUNTY DISTRICT COURT,
AND
JIM MATTOX, ATTORNEY GENERAL
OF
THE STATE OF TEXAS
. . . . . Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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June 22, 1990

Austin, TX ■ American Atheist Press ■ (512) 458-1244

Questions Presented for Review

I

Does the practice of a Texas trial court, in excluding from jury service Atheists summoned therefor under penalty of law who refuse to take a statutorily required "So help me God" oath to qualify for jury service, offend Article VI of the Constitution and both the Free Exercise and the Establishment Clause of the First Amendment thereto, as well as correlative Texas State Constitutional provisions herein enumerated?

II

Does the practice of a Texas trial court in forcefully requiring an Atheist to profess the "religion" of Atheism on a juror's summons return violate his freedom of conscience and his privacy both protected by the Free Exercise and the Establishment Clause of the First Amendment to the Constitution of the United States?

III

Does the Constitution of the State of Texas establish an exclusively religious judicial base, to the detriment of Atheist litigants, when it requires under Article 16, Section 1 that all judges must be sworn into office with a God-test oath?

List of All Parties

JON G. MURRAY,

MADALYN O'HAIR,

ROBIN MURRAY-O'HAIR, and

SOCIETY OF SEPARATIONISTS, INC.

Petitioners and Plaintiffs below.

TRAVIS COUNTY DISTRICT COURTS,
HARLEY CLARK, Honorable, Local Administrative Judge for the District and County Courts of Travis County,
JERRY DELLANA, Honorable District Court Judge of the Travis County District Court,

JIM MATTOX, Attorney General of the State of Texas

Respondents and Defendants below.

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Opinions Below

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

On March 24, 1989, the original order and opinion of the United States District Court for the Western District of Texas, Austin Division, dismissed the plaintiffs' complaint under Rule 12(b)(6) as insufficient to state a cause of action.

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Speaking to the Constitutional issues, and applying the *Lemon* test, the court first held that a God-test oath for jurors "does not violate the separation of church and state," since (a) it has the secular purpose of conferring an atmosphere of formality on "jury deliberation"; (b) puts persons on notice of the seriousness of the proceedings; and (c) any reference to God in such an oath is incidental to the oath, and does not advance or inhibit religion.

Secondly the court held that an Atheist's claim of being excluded from jury service (by refusing a God-test oath as against his conscience) at any time in the jury selection process is without merit and fails to state a claim upon which relief may be granted.

Thirdly the court held that the required disclosure of a summonsed prospective juror's "religion," declared on the back of the summons in order to obtain entrance to the court room, (a) has the secular purpose of assisting attorneys with their jury strikes during voir dire, (b) is justified by a substantial government interest, (c) is a mere incidental burden on the prospective jurors, and (d) reaches a government goal of "benevolent" neutrality.

The fourth and final ruling of the district court, in a footnote, was that the complaint of a judicial God-test oath barring Atheists (none of whom could ever take such a God-test oath) from any judicial office was insufficient to state a claim. (See Appendix A.)

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

On February 26, 1990, the Court of Appeals for the Fifth Circuit affirmed the decision of the District Court for the reasons indicated therein. (See Appendix B.)

On April 25, 1990, due to a heart attack of the attorney of record, a Motion for Leave to File and an Application for Extension of Time for Filing Petition for Certiorari was filed with the Supreme Court of the United States.

On April 26, 1990, Associate Justice Byron R. White issued an order extending the time for filing a petition for a writ of certiorari up to and including June 26, 1990.

With the intervention into the case of the Washington, D.C., branch of the law firm of Seyfarth, Shaw, Fairweather & Geraldson, because of the continued hospitalization of the attorney of record, a Motion for Recall of Mandate was filed on May 1, 1990.

The Motion for Recall of Mandate was denied by Sam D. Johnson, Judge, United States Court of Appeals for the Fifth Circuit on May 23, 1990.

Jurisdiction

The jurisdiction of this Court is invoked on the grounds that the United States Court of Appeals for the Fifth Circuit has decided a question of federal law herein which conflicts with applicable decisions of this Court. Alternately, the United States Court of Appeals for the Fifth Circuit has decided a question of federal law which has not been, but should be, settled by this Court, and which is in conflict with other circuits.

The final judgment of the United States Court of Appeals for the Fifth Circuit was entered on February 26, 1990. Jurisdiction of this Court is timely, a Motion for Extension of Time to File Application for a Writ of Certiorari to June 26, 1990, having been approved by Associate Justice Byron R. White on April 26, 1990.

Jurisdiction of this Court is also invoked under 28 U.S.C. § 2102(c) and 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES

CONSTITUTION OF THE UNITED STATES

ARTICLE VI

Article VI of the Constitution of the United States provides in pertinent part:

> [b]ut no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States. (emphasis added)

FIRST AMENDMENT

The First Amendment to the Constitution of the United States provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

FOURTEENTH AMENDMENT

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF TEXAS

ART. I, § 3

EQUALITY UNDER THE LAW. Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. (Emphasis added.)

ART. I, § 4

RELIGIOUS TESTS. No religious test shall ever be required as a qualification to any office, or public trust, in this State; nor shall any one be excluded from holding office on account of his reli-

gious sentiments, provided he acknowledge the existence of a Supreme Being.

ART. I, § 5

WITNESSES NOT DISQUALIFIED BY RELIGIOUS BELIEFS; OATHS AND AFFIRMATIONS. No person shall be disqualified to give evidence in any of the Courts of this State on account of his religious opinions, or for the want of any religious belief, but all oaths or affirmations shall be administered in the mode most binding upon the conscience, and shall be taken subject to the pains and penalties of perjury.

ART. I, § 6

FREEDOM OF WORSHIP. (provides in pertinent part) No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship.

ART. I, § 15

RIGHT OF TRIAL BY JURY. (provides in pertinent part) The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency.

ART. V, § 31

COURT ADMINISTRATION AND RULE-MAKING AUTHORITY. (a) The Supreme Court is responsible for the efficient administration of the judicial branch and shall promulgate rules of administration not inconsistent with the laws of the state as may be necessary for the efficient and uniform administration of justice in the various courts.

(b) The Supreme Court shall promulgate rules of civil procedure for all courts not inconsistent with the laws of the state as may be necessary for the efficient and uniform administration of justice in the various courts.

ART. VI, § 3, 5

QUALIFIED ELECTOR. (provides in pertinent part) Every person . . . who shall be a citizen of the United States and who shall have resided in this State . . . within the district or county in which such person offers to vote, shall be deemed a qualified elector.

ART. XVI, § 1

OFFICIAL OATH. (provides in pertinent part) Members of the Legislature and all other elected officers, before they enter upon the duties of their offices, shall take the following Oath or Affirmation:

"I, ————————————, do solemnly swear (or affirm), that I will faithfully execute the duties of the office of ———————— of the State of Texas . . . So help me God."

The Secretary of State, and all other appointed officers, before they enter upon the duties of their offices, shall take the following Oath or Affirmation:

"I, ————————————, do solemnly swear (or affirm), that I will faithfully execute the duties of the office of ———————— of the State of Texas . . . So help me God."

ART. XVI, § 19

QUALIFICATIONS OF JURORS. The Legislature shall prescribe by law the qualifications of grand and petit jurors; provided that neither the right nor the duty to serve on grand and petit juries shall be denied or abridged by reason of sex. (emphasis added)

ART. 16, § 43

EXEMPTIONS FROM PUBLIC DUTY OR SERVICE. No man, or set of men, shall ever be exempted, relieved or discharged, from the performance of any public duty or service imposed by general law, by any special law. Exemptions from the performance of such public duty or service shall only be made by general law.

U. S. STATUTORY PROVISIONS

28 U.S.C. § 1343(3) and (4),
28 U.S.C. § 2201, 2202
42 U.S.C. § 1983
FRCP, Rule 65

TEXAS STATE STATUTORY PROVISIONS

TCCP ART. 35.04

CLAIMING EXEMPTION. Any person summoned as a juror who is exempt by law from jury service may establish his exemption without appearing in person by filing a signed statement of the ground of his exemption with the clerk of the court at any time before the date upon which he is summoned to appear.

TCCP ART. 35.12

MODE OF TESTING. In testing the qualification of a prospective juror after he has been sworn, he shall be asked by the court, or under its direction:

1. Except for failure to register, are you a qualified voter in this county and state under the Constitution and laws of this state?
2. Have you ever been convicted of theft or any felony?
3. Are you under indictment or legal accusation for theft or any felony?

TRCP, § 226,-

OATH TO JURY PANEL. Before the parties or their attorneys begin the examination of the jurors whose names have thus been listed, the jurors shall be sworn by the court or under its direction, as follows: "You, and each of you, do solemnly swear that you will true answers give to all questions propounded to you concerning your qualifications as a juror, so help you God."

TRCP, §236

OATH TO JURY. The jury shall be sworn by the court or under its direction, in substance as follows: "You, and each of you, do solemnly swear that in all cases between parties which shall be to you submitted, you will a true verdict render, according to the

law, as it may be given you in a charge by the court, and to the evidence submitted to you under the rulings of the court. So help you God."

TRCP, § 226a

JURY INSTRUCTIONS. Pursuant to the provisions of Rule 226, TRCP, it is ordered by the Supreme Court of Texas:

II. That the following oral and written instructions, with such modifications as the circumstances of the particular case may require, shall be given by the court to the jury immediately after the jurors are selected for the case:

Oral Instructions

Ladies and Gentlemen:

By the oath which you take as jurors, you become officials of this court and active participants in the public administration of justice.

TEX. GOV. CODE ANN. (VERNON 1987) § 62.101

JURY SERVICE. All individuals are competent petit jurors unless disqualified under this subchapter and are liable for jury service except as otherwise provided by this subchapter.

TEX. GOV. CODE ANN. (VERNON 1987) § 62.102

GENERAL QUALIFICATIONS FOR JURY SERVICE. A person is disqualified to serve as a petit juror unless he:

(1) is at least 18 years of age;

(2) is a citizen of this state and of the county in which he is to serve as a juror;

(3) is qualified under the constitution and laws to vote in the county in which he is to serve as a juror;

(4) is of sound mind and good moral character;

(5) is able to read and write;

(6) has not served as a petit juror for six days during the preceding three months in the county court or during the preceding six months in the district court;

(7) has not been convicted of a felony; and

(8) is not under indictment or other legal accusation of misdemeanor or felony theft or any other felony.

TEX. GOV. CODE ANN. (VERNON 1987) § 62.106
EXEMPTION FROM JURY SERVICE. A person qualified to serve as a petit juror may establish an exemption from jury service if he:

(1) is over 65 years of age;

(2) has legal custody of a child or children younger than 10 years of age and his service on the jury requires leaving the child or children without adequate supervision;

(3) is a student of a public or private secondary school;

(4) is a person enrolled and in actual attendance at an institution of higher education;

(5) is an officer or an employee of the senate, the house of representatives, or any department, commission, board, office, or other agency in the legislative branch of state government; or

(6) is summoned for service in a county with a population of at least 200,000, unless that county uses a jury plan under Section 62.011 and the period authorized under Section 62.011(b)(6) exceeds two years, and he has served as a petit juror in the county during the 24-month period preceding the date he is to appear for jury service.

TEX. GOV. CODE ANN. (VERNON 1987) § 62.110
JUDICIAL EXCUSE OF JURORS. (provides in pertinent part)
(a) Except as provided by this section, a court may hear any reasonable sworn excuse of a prospective juror and release him from jury service entirely or until another day of the term.

TEX. GOV. CODE ANN. (VERNON 1987) § 62.111
PENALTY FOR DEFAULTING JURORS. A juror lawfully notified shall be fined not less than $10 nor more than $100 if he:

(1) fails to attend court in obedience to the notice without reasonable excuse; or

(2) files a false claim of exemption from jury service.

TEX. GOV. CODE ANN. (VERNON 1987) § 62.112
EXCUSE OF JUROR FOR RELIGIOUS HOLY DAY. (a) In this section:

(1) "Religious organization" means an organization that

meets the standards for qualification as a religious organization under Section 11.20, Tax Code.

(2) "Religious holy day" means a day on which the tenets of a religious organization prohibit its members from participating in secular activities, such as court proceedings.

(b) If a prospective juror is required to appear at a court proceeding on a religious holy day observed by the prospective juror, the court or the court's designee shall release the prospective juror from jury service entirely or until another day of the term. If the court determines that a term of a court proceeding may extend to cover a day on which a religious holy day is observed by the prospective juror, the court or the court's designee shall release the prospective juror from jury service entirely until another day of the term.

(c) A prospective juror who seeks to be released from jury service may be required to file with the court an affidavit stating:

(1) the grounds for the release; and

(2) that the juror holds religious beliefs that prohibit him from taking part in a court proceeding on the day for which the release from jury duty is sought.

Statement of the Case

Petitioners, who are Atheists, filed their original 42 U.S.C. § 1983 and 1988 complaint on August 11, 1987, in the United States District Court for the Western District of Texas, Austin Division. The complaint sought immediate injunctive relief respecting a hearing scheduled for August 17, 1987, in the Travis County District Court in which they were litigants; a Declaratory Judgment that TCRP Rules 226, 236, and 236a violated the First and Fourteenth Amendments to the Constitution of the United States and Article I, sections 3, 4, 5, and 6 of the Texas Constitution; a permanent injunction against the use of the God-test oath or prayer be granted; a Declaratory Judgment that the use of the juror summons card forcing plaintiffs to profess Atheism as a religion violated the First and Fourteenth Amendments to the Constitution of the United States, and Article I, sections 3, 4, 5, and 6 of the Texas Constitution; a Declaratory Judgment that the Travis County summoning, selection, and impaneling procedure violated the First and Fourteenth Amendments to the Constitution of the United States, and Article I, sections 3, 4, 5, and 6 of the Texas Constitution and the Open Courts provision of the Texas Constitution; a Declaratory Judgment that Article 16, Sec. 1 of the Texas Constitution requiring a God-test oath for elected and appointed jurists of the State when taking office violated the First and Fourteenth Amendments to the Constitution of the United States.

Plaintiffs alleged a twelve-year (from 1974 through 1988) continuing pattern of the District Courts of Travis County whereby they respond to summons for jury service, are forced on the return portion of the summons to define "Atheism" as a religion in order to get into the court room with other prospective jurors, once there they refuse to take a God-test oath and are excluded, for that refusal, by the presiding judge from consideration as prospective jurors and ipso facto from actual jury service.

At the time of the filing of the suit, 11 August 1987, Plaintiffs O'Hair and Society of Separationists, Inc., were defendants in a civil action (Strobel v. O'Hair, Cause 271.161) wherein the Plain-

tiff Strobel had requested a jury trial.[1]

The State of Texas moved for dismissal on three grounds: (1) federal court abstention, (2) sovereign immunity and (3) previous adjudication of Article 1, Sec. 4 of the Constitution of the State of Texas (not at issue in this case).

The lower court issued an order, under Rule 12(b)(6) that the complaint failed to state a claim upon which relief could be granted.

Petitioner-Appellants appealed.

The United States Court of Appeals for the Fifth Circuit affirmed the decision of the United States District Court for the Western District of Texas, Austin Division.

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[1]Trial was set for August 17, 1987, before a judge who under Article 16, Sec. 1 of the Constitution of the State of Texas had taken office through a compulsory oath, "So Help Me God." With both judge and jurors so sworn, the Atheist plaintiffs were tried by a court system in which no Atheist could ever be a judge and in which all Atheists had been excluded from jury service, thereby precluding the right to a fair trial. The judge, Hume Cofer, had been he who had Plaintiff O'Hair, at a prior time, forcibly removed from his court, and physically retained in his chambers, for refusing to take the God-test oath for juror selection. A judgment of $40,000 against O'Hair and the Society of Separationists was subsequently reversed on appeal on the threshold issue of refusal of the judge to recuse himself for bias. It was remanded to the District Court of Travis County where it remained on the docket for ten years despite statutory one-year drop-docket rules because, inter alia, the judge continued to refuse to recuse himself. As "pending litigation," the plaintiffs had been, from time to time, terrorized by threats to reactivate the suit, the alleged damages having been in that decade arbitrarily raised to $1 million, which threat actually materialized during this period, with hearing set for August 17, 1987.

Plaintiffs, being deprived of a fair trial, suffered real monetary damages and complete loss of rights which should have been protected by the First and Fourteenth Amendments to the Constitution of the United States.

Argument for Granting The Writ

The Texas Constitution provides (ART. 16 §19) that the legislature prescribes the qualifications of grand and petit jurors for jury service which is described in the Constitution as "a right" and "a duty" for all United States citizens residing in the State. This is manifested in TEX. GOV. CODE ANN. § 62.101, which defines a juror. (All individuals are competent petit jurors . . . and are liable for jury service . . .) The citizen can be fined if he fails to attend court following receipt of the summons (ART. 22.004) or a law enforcement agent may be dispatched to physically bring him to the court. Statutory provisions describe in minute detail the qualifications for a prospective juror when summonsed to appear (ART. 35.12). Those who may be exempted are carefully defined (ART. 62.101 through ART 62.112) and typically include those over sixty-five years of age, blind, deaf, students, those with minor children in their, etc. Exemptions requested by citizens in these categories must be initiated by the citizens in order to avoid fines for non-attendance (ART 35.04) or law enforcement agent compulsion.

At all times plaintiffs have been fully qualified for jury service and were not described in any of the exemptions.

The Supreme Court of the State of Texas has been empowered by the Texas Constitution to provide rules of procedure for the Texas judicial system (ART. 5, § 30). The TRCP and TCCP promulgated by that body include instructions for the jury system. Among these instructions are TRCP § 26 which requires all persons summoned for possible jury service to be tested for jury qualifications under TCCP ART 35.12. However, before such qualification can be had, each prospective juror is required to take a God-test oath as to truth telling regarding his qualifications, under TRCP § 226. Once qualified and assigned to particular courts in the system, the jurors are required to take another God-test oath that they will "a true verdict render" under TRCP § 236. They are then orally instructed "By the oath which you take as jurors, you become officials of this court and active participants in the public administration of justice" under TRCP § 236a. (Emphasis added.) In Texas, as "officials" of the court and

"active participants in the public administration of justice" jurors come squarely under the provision of Article VI of the Constitution of the United States with its definition of "office or public trust" and also under Torcaso v. Watkins 367 U.S. 488 (1961).

Since Atheists, by their refusal to take a God-oath truth telling test, are excluded from qualifying for jury service they are ipso facto excluded from jury service itself.

Article VI of the Constitution of the United States negates the need for any God-test oath for any office or public trust in the United States. Torcaso specifically prohibits such a test. TRCP 226, 236, and 236a flies in the face of both obligations and are prima facie unconstitutional *vis-à-vis* both the Establishment and the Free Exercise (of conscience) clauses of the First Amendment to the Constitution of the United States.

In respect to the Jury Summons and the requirement that Atheists classify their *weltanschauung* (conscience) as a religion and also reveal it as a religion is patently unconstitutional as revealed in an entire series of Supreme Court cases beginning with Everson v. Board of Education, 330 U.S. 1 (1946) and carried through to this date.

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. (Emphasis added.) No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.

Under this doctrine, never repudiated by the Supreme Court, the forced Jury Summons disclosure is an unconstitutional exercise of the Texas jury system.

Additionally, Griswold v. Connecticut 381 U.S. 479 (1965) holds that each person has a constitutionally protected "right of privacy" which may not be invaded by the state.

The Fifth Circuit has accepted in the case of O'Hair v. White, 675 F.2d 680 (1982) the holding of Roe v. Klein Indep. School Dist. H-80-1982 (S.D. Tex. Dec. 30, 1981) that a question on a teacher application form inquiring whether the applicant believes in a supreme being unconstitutionally interfered with the applicant's privacy rights.

A second Fifth Circuit case is that of Nicholson v. Bd. of Cmsrs. of Ala. State Bar Assn., 338 F.Supp. 48 (DC Ala 1972) in which a God-oath required to become a member of the Alabama Bar Association was challenged. The District Court held:

> The question whether a state may require a person who objects on religious grounds to take an oath or affirmation invoking the help of God is not frivolous and so far as we have discovered that question has not been decided by the Supreme Court of the United States. (pp. 52-3)
>
> We hold that it is a violation of the Constitution for the State of Alabama to compel Plaintiff to swear an oath invoking the help of God as a prerequisite to entering upon the practice of law. (p. 59)

The God-test oath for office taking required by ART 16 § of the Constitution of the State of Texas of all elected and appointed officials and, thus of all jurists, is equally unconstitutional under Art. VI of the United States Constitution, Torcaso, Everson and Nicholson.

Curiously both the District Court and the Fifth Circuit included in their decisions erroneous or mistaken statements of "facts."

In regard to the decision of the United States District Court, Western District of Texas, Austin Division:

(a) the court stated, "Trials are public forums and a citizen who wishes to see the Courts in action may visit at any time. However,

there is no Constitutionally cognizable right to view Courts from the vantage point of a jury box. . . . Plaintiffs have no vested right to sit on a jury."

Plaintiffs, as other citizens, have a constitutionally protected right to trial by jury (Seventh Amendment), the concomitant of which is that they also have a constitutionally protected right and a statutory right (ART. I. § 3, 3a and 15 and TEX. GOV. CODE ANN. SEC. § 62.101) to sit as a juror, for the system contemplates an impartial jury drawn from a cross-section of the community of which they are an inherent part. The Plaintiffs had not wandered into court hoping to see the court in action from the vantage point of a jury box. They had been summonsed and then deliberately excluded because of their inability to take a God-test oath. The entire framework of a democratic government is predicated on the right to a trial by jury, protected in Texas by ART. I, SEC. 15 of its Constitution. If members of a class of citizens, in this case Atheists, are systematically, purposefully, arbitrarily, and with discrimination, excluded from jury service solely because of being members of that class (Atheists) the entire tradition of trial by jury fails. Slaughter House Cases, 16 Wall (83 U.S.) 36 (1873), Strauder v. West Virginia, 100 U.S. 303 (1880), and Brown v. Board of Education, 349 U.S. 294 (1955). Such discrimination "is at war with our basic concepts of a democratic society and a representative government." Smith v. Texas, 311 U.S. 128 (1940). No persons may be excluded from this right to sit as jurors based on factors which have no relationship to their competency as jurors, or no other legitimate state objective. No individual citizen can be deprived under Fourteenth Amendment of individual equality under the law solely because he belongs to an identifiable group against which official discrimination is leveled. Jury selection must insure all potential jurors equal consideration. Strauder v. West Virginia, supra, Thiel v. Southern Pacific Co., 328 U.S. 217. See also Carter v. Jury Commission, 396 U.S. 320 (1970), and Ciudadanos Unidos De San Juan v. Hidalgo Cty., Etc., 622 F.2d 807 (1980).

In Texas, the method which is specified for testing the prospective juror's qualifications is interrogation under oath. If an Atheist cannot take a God-test oath for truth telling, there is avail-

able to the State of Texas a secular test which is to take such testimony under "pains and penalty of perjury." The Supreme Court has consistently held when applying the Lemon v. Kurtzman, 403 U.S. 228 (1982) test in innumerable cases that a religious solution may not be utilized if a secular one is at hand. Such a secular truth-telling test (under "pains and penalty of perjury") would be alike applicable for both theist and Atheist and in complete conformity with the equal treatment for citizens stipulated under the Fourteenth Amendment.

The Constitution of the State of Texas already provides such a truth-telling formula for witnesses but denies the benefit of such a test to prospective jurors.

> ART 1 SEC 5, No person shall be disqualified to give evidence in any of the Courts of the State on account of his religious opinions, or for the want of any religious belief, but all oaths or affirmations shall be administered in the mode most binding upon the conscience, and shall be taken subject to the pains and penalties of perjury.

The same is applicable to the District Court's curious conclusion that information concerned with religion, gathered by the State of Texas by forcing prospective jurors to declare their religions on the reverse side of the juror summons card, will aid attorneys in their jury strikes during voir dire. It is not the duty of the State of Texas to gather such religious information for the benefit of attorneys. Any attorney may ask any juror concerned with that juror's religion in open court during voir dire if it is germane to the issues being litigated.

The following statement by the district court was nowhere in evidence:

> If they were uncertain as to a penalty for not stating a religious preference, upon inquiry, they would have learned that they need not state a religious preference at all.

The actual situation was that the plaintiffs were required by the

bailiff, standing at the door of the court room, to state that Atheism was a religion by filling in the required "religion" blank before the plaintiffs could enter the court room where they were required to report for jury service.

In regard to the decision of the United States Court of Appeals for the Fifth Circuit:

During the oral argument before a three-judge panel of the Fifth Circuit Court of Appeals in Fort Worth, Texas, on February 5, 1990, the issue on which the judges demanded discussion was why Atheists cannot take an "affirmation" (not mentioned in either the obligatory TRCP 226, or TRCP 236).

The affirmation was originally designed for Quakers, Anabaptists, Mennonites, Dunkers, Moravians, Jehovah's Witnesses, and those who interpreted literally that the admonitions of Jesus Christ (Matt. 5:33-7) means that no oaths could ever be taken by Bible believers, and who require a substitute therefor. Atheists are intellectually repulsed by the "affirmation" which has been deliberately fashioned for the use of biblical literalists and they deem it to be religious.

The actual biblical admonition is:

Matt 5: 33-7

33 Again, ye have heard that it hath been said by them of old time, Thou shalt not forswear thyself, but shalt perform unto the Lord thine oaths;

34 But I say unto you, Swear not at all; neither by heaven; for it is God's throne;

35 Nor by the earth; for it is his footstool; neither by Jerusalem; for it is the city of the great King.

36 Neither shalt thou swear by thy head, because thou canst not make one hair white or black,

37 But let your communication be, Yea, yea; Nay, nay; for whatsoever is more than these cometh of evil.

Holy Bible, King James Edition

A usual courtroom practice throughout the land, of which the

Supreme Court may take judicial notice, is for the court to ask "Do you solemnly swear or affirm, . . . so help you God," — with the appendage, "so help you God" on either form of the truth-telling formula be it oath or affirmation. The average citizen perceives that either the oath or affirmation (whether for a prospective juror, a juror, or a witness) is based on the premise that God is called for help, that both oath and affirmation is religious and rely on God. The Texas obligation is for an "oath" only.

In its decision the Fifth Circuit Court of Appeals held, without relevant testimony on the subject, "We do not consider, as plaintiffs would have us do, an affirmation to be the same as an oath to a deity." This sentence alone should have overruled the District Court's decision that "The reference to God, or swearing by God, is incidental to the oath." The decision of the Fifth Circuit upholding the District Court's decision is in conflict with it in respect to "the God issue."

The Fifth Circuit holds the oath to be to a deity and, therefore, religious. The District Court, the opinion of which the Fifth Circuit affirms, holds the oath to be itself secular and used for a secular purpose.

Ignoring both the Constitutions of the United States and the State of Texas and turning from the above basic Supreme Court decisions, the District Court and the Fifth Circuit seized upon the concept that there is not, in the land, a constitutionally protected right to jury service. This would appear to negate the entire jury system of the United States which calls for all citizens to be members of the jury system both in federal and in state courts.

Indeed, the federal government has indicated to the contrary that which is promoted by the District and the Fifth Circuit Courts, in Pub.L. 85-315, Part V. § 152, 71 Stat. 638; Mar. 27, 1968, Pub.L. 90-274, § 101, 82 Stat. 54 which resulted in FRCP 28 § 1861 and 1863 declaring in respect to federal courts, in pertinent part:

§ 1861. DECLARATION OF POLICY. It is the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors

when summoned for that purpose.

§ 1862. DISCRIMINATION PROHIBITED. No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States . . . on account of race, color, religion, sex, national origin, or economic status.

Although the courts under consideration are those of the State of Texas, it would appear that the same considerations and the same policy of the government of the United States should apply to all court systems equally, especially since the federal judicial system exercises appellate jurisdiction over state courts..

The opinion of the District Court, affirmed by the Fifth Circuit, is in direct conflict with the Supreme Court decision in Carter v. Jury Commission, 396 U.S. 320 (1970) in which the Supreme Court held that injunctive and declaratory relief is available to members of a class unconstitutionally excluded from jury service.

In the instant case, Petitioners filed a complaint in which they alleged that the jury selection procedures of Texas state courts systematically exclude Atheists from jury service in violation of the First and Fourteenth Amendments to the Constitution of the United States. The complaint alleged that Petitioners had been summoned for jury service, but were summarily excluded after refusing to take statutorily required God-test oaths. The U.S. District Court for the Western District of Texas dismissed petitioners' complaint for failure to state a claim for relief, concluding that "there is no constitutionally cognizable right to" jury service. The court explained that it had "not discovered, nor have Plaintiffs pointed out, any instance whereby a potential juror has standing to assert the denial of a public benefit related to jury service."

On appeal, the United States Court of Appeals for the Fifth Circuit affirmed the district court's order. It stated that it "agree[d]" with the district court's determination that "because the right to serve on a jury is not a constitutionally protected one, the plaintiffs' cause of action had failed to state a claim."

The Supreme Court, however, has ruled, contrary to the hold-

ings of these two courts, that the right to serve on a jury does enjoy constitutional protection. In Carter, the Court upheld the right of potential jurors to challenge a state court's jury selection procedures on the grounds the procedures systematically excluded Blacks from jury service. The Supreme Court flatly rejected the defendants' contention that only litigants have a "cognizable legal interest in nondiscriminatory jury selection," concluding instead that "[p]eople excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion." The Court went on to explain its reasoning as follows:

> Surely there is no jurisdictional or procedural bar to an attack upon systematic jury discrimination by way of a civil suit such as the one brought here. The federal claim is bottomed on the simple proposition that the State, acting through its agents, has refused to consider the appellants for jury service solely because of their race. Whether jury service be deemed a right, a privilege, or a duty, the State may no more extend it to some of its citizens and deny it to others on racial grounds than it may invidiously discriminate in the offering and withholding of the elective franchise.

Additionally, the Fifth Circuit has followed Carter's reasoning and applied it to a suit brought by a community organization and its members alleging that Texas jury selection procedures discriminated against women, the young, "poor people," and Hispanics. Ciudadanos Unidos de San Juan v. Hidalgo County Grand Jury Commissioners, 622 F.2d 807 (5th Cir. 1980), cert. denied, 450 U.S. 964 (1981) noted that the "district court concluded that the proper parties to bring these suits were not those who had been discriminatorily excluded from consideration for grand jury service, but were those who had been indicted by unconstitutionally composed grand juries." Id. at 815. The Fifth Circuit rejected the district court's conclusion, stating succinctly that "[a]s a proposition of law, this is simply incorrect." Citing to Carter the Fifth Circuit explained that "the Supreme Court ex-

pressly held that civil suits [challenging discriminatory jury selection procedures] could be maintained by the victims of the state's exclusionary practices." The Court then observed that the Supreme Court had emphasized "that suits by the classes discriminatorily excluded were the preferred mode of attacking grand jury discrimination." Id. at 816, citing Rose v. Mitchell, 443 U.S. 545 (1979).

Neither Carter nor Ciudadanos expressly stated that potential jurors alleging religious discrimination or discrimination because of their opinions respecting religion, such as Atheists, could bring an action challenging the exclusion of members of their group from jury service. However, given the breadth of the Fifth Circuit's opinion in Ciudadanos, which held that "poor people" had a valid claim for unconstitutional discrimination, and given the Constitution's unequivocal condemnation of any sort of religious preference see e.g., Larson v. Valente, 456 U.S. 228, at 244 (1982), it is frankly inconceivable that Carter's holding does not apply to claims of discrimination against either religious or Atheist potential jurors. See also Thiel v. Southern Pacific Co., supra, at 220, stating that "prospective jurors shall be selected by court officials without systematic and intentional exclusion" of inter alia, representatives of religious groups.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE.

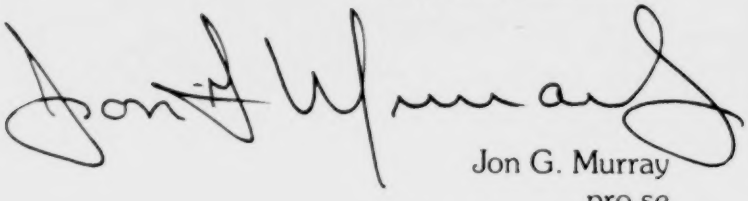
Federal jurisdiction was invoked under 42 U.S.C. Sec. 1983, 1988, 28 U.S.C. Secs. 1342(3) and (4) and 28 U.S.C. Sec. 2201, 2202 and the First and Fourteenth Amendments to the Constitution of the United States.

The United States Court of Appeals for the Fifth Circuit has affirmed the United States District Court, Western District of Texas, Austin Division's opinion which is in direct conflict with Article VI and the First and Fourteenth Amendment, to the Constitution of the United States, together with concomitant Texas Constitutional Provisions, and with a number of Supreme Court decisions in respect to the right of citizens to jury service; and

has decided an important federal question of judicial oath-taking which has not been, but should be, settled by the Supreme Court of the United States.

Important and fundamental constitutional rights are involved in this action. Furthermore, judicial economy seems to dictate that this action be reviewed with a writ of certiorari issuing to the Court of Appeals for the United States Fifth Circuit.

Respectfully Submitted,

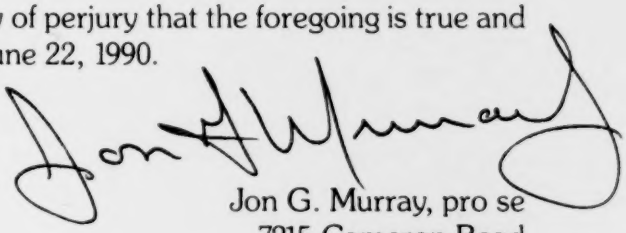


Jon G. Murray
pro se
7215 Cameron Road
Austin, Texas 78752
(512) 458-3342

Certificate of Service

I, Jon G. Murray, hereby certify that I have mailed the required copies of the foregoing Petition for Writ of Certiorari to Jim Mattox, Attorney General of Texas, Mary F. Keller, First Assistant Attorney General and Cynthia Alksne, Assistant Attorney General, at P. O. Box 12548, Capitol Station, Austin, Texas 78711, in duly addressed envelopes, with postage prepaid, on or before June 22, 1990.

I certify under penalty of perjury that the foregoing is true and correct. Executed on June 22, 1990.



Jon G. Murray, pro se
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June 22, 1990

This item is informational only. Proof of Service has been filed with, but apart from, this application for writ of certiorari.

Appendices

Appendix A.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JON G. MURRAY, ET AL.,
A-89-CA 1463

v.

TRAVIS COUNTY DISTRICT COURT and JIM MATTOX,
Attorney General of the State of Texas,

ORDER

BEFORE THIS COURT is Defendant Attorney General of the State of Texas's Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Defendant's Motion was filed on September 10, 1987. On January 31, 1989, the cause was transferred to this Court's docket and set for trial on March 27, 1989. Upon review of the Complaint, the Motion to Dismiss and response of Plaintiffs, and consideration of the legal authorities, the Court is of the opinion that pursuant to Rule 12(b)(6), Plaintiffs' Complaint should be dismissed.

Plaintiffs allege a continuing pattern whereby they (1) respond as requested for jury service in the Travis County District Court, (2) refuse to take a "God" oath, and (3) are excluded by the presiding Judge from jury service. The manner of excluding the Plaintiffs from jury service varies from incident to incident, however, the differences are not material. Plaintiffs also object to Travis County's use of a jury information form which requests persons state their religious preference. Plaintiffs do not state in their Complaint the manner in which the Court uses the information or that the bare act of making the request worked a

hardship on them other than their view that they are wrongfully excluded from jury service. It appears that the Plaintiffs contend that the jury information form in two manners violates the Constitution: (1) it violates the doctrine of separation of church and state; and (2) causes them to be denied the opportunity to perform jury service. Plaintiffs do not explain whether or how they filled out the jury information form question relating to religious preference.

Defendants move for dismissal on three grounds: (1) The doctrine of Federal Court abstention requires this Court to refrain from interfering with the management of the state government when the Constitutional challenge is intertwined with an ambiguous issue of state law and there is a likelihood that clarification of the state law will moot or substantially alter the federal issue. (2) The doctrine of sovereign immunity prevents the maintenance of suit under 24 U.S.C. Sec. 1983 against a state and its agencies. (3) Many of Defendant's claims were previously adjudicated in a federal forum.

Plaintiffs' complaint raises two issues: (1) Does the practice of a State trial court in excluding from jury service persons who refuse to make an oath deny a vested interest? (2) Does such a practice violate the Constitutional provision of separation of church and state?

Because the Court is of the opinion that Plaintiffs have no Constitutionally protected interest in sitting on a jury and that jury oath which refers to a deity does not violate the principle of separation of church and state, the cause should be dismissed pursuant to rule 12(b)(6) for failure to state a claim upon which relief may be granted. The Court will not abstain from ruling on the Constitutional challenge; it does not appear that the Court's ruling this day will have any interfering effect on any State Court suit. Further, the Court agrees in part with the Plaintiffs that some of the challenges raised in this cause and the subject of this memorandum opinion are distinct from previous Federal Court matters.

DISCUSSION

Plaintiffs brought suit on August 11, 1987, and were granted leave to amend their complaint after Defendants interposed several Motions to Dismiss. The Amended Complaint in general complains of the jury summoning, selection and impaneling procedures utilized by the Courts of Travis County. The jury summons information card, Plaintiffs contend, violates the establishment and free exercise clauses of the First Amendment to the U.S. Constitution, "in that jurors are forced to profess a religion and that the State of Texas . . . seems to be endorsing and thus establishing the religion of Judeo-Christianity." These purple prose are at best reaching and at worst, barely sufficient to survive scrutiny under the standard of review of Rule 11, Federal Rules of Civil Procedure.[1]

Though the Plaintiffs argue that several of their number are "involved in civil litigation" and they fear that they could not receive a fair jury trial because of the use of a "God" oath, this claim is not properly before this Court as Plaintiffs have not alleged facts giving rise to a justiciable claim; the right to jury issue is at best, a potential disability.

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[1]Rule 11, F.R.C.P. provides in pertinent part:

"Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the Court, upon motion or upon its own initiative, shall impose on the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee."

The denial of a public benefit based on an utterance related to First Amendment is not permitted. Spevack v. Klein, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574 (1967); Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960). This principle has been applied to benefits such as public employment, and bar membership. The Court has not discovered, nor have Plaintiffs pointed out, any instance whereby a potential juror has standing to assert the denial of a public benefit related to jury service. The jury fee is nominal and not a benefit. Plaintiffs do not allege that they are denied the fee due them for reporting for jury service.

Trials are public forums and a citizen who wishes to see the Courts in action may visit at any time. However, there is no Constitutionally cognizable right to view Courts from the vantage point of a jury box. There is an important distinction to be made between a state practice which directly interferes with the exercise of a belief — whether religious or not — and a practice which has the secondary effect of limiting participation in certain interesting activities. The Plaintiffs' interest in serving on a jury is commendable. However, just as a person who professes membership in a religious cult could not assert a right to sit on a jury if litigants routinely exclude her when they exercise their strikes, Plaintiffs have no vested right to sit on a jury. This is not a matter whereby the Court should abstain from considering a Constitutional challenge to a state government practice; there is no colorable Constitutional challenge at issue. The argument that being excluded from jury service at any time in the jury selection process is without merit and fails to state a claim upon which relief may be granted.

With regard to the jury summons information form, it is undisputed that the Plaintiffs cannot be made to endorse any belief. The freedom to hold religious beliefs or not hold them is absolute. Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).[2] Plaintiffs have not directly asserted in this cause that

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[2]This principle is consistently applied to other First Amendment utterances. For example, it is well established that school children cannot be forced to salute or say a pledge to the flag. West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). Similarly, a motorist

they were made to endorse a religious belief or forego their own non-belief. If they were uncertain as to a penalty for not stating a religious preference, upon inquiry, they would have learned that they need not state a religious preference at all. Plaintiffs rely on the mere inquiry on the form and nothing more to establish a causal connection between the form and their dismissal from jury service and the violation of the principle of separation of church and state.

The information form aids in the dissemination of information about the jurors to litigants so that they may intelligently exercise their jury strikes. The form itself does not endorse a religious belief or the necessity of holding any religious belief. The information form is a rational and reasonable manner of implementing the substantial governmental interest of an efficient jury service which passes Constitutional muster to provide the right of trial by jury to civil and criminal litigants. Compare the reasoning of the Supreme Court in Gillette v. United States, 401 U.S. 437, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971) when it held that there was no free exercise violation since the "incidental burdens" imposed on religion were justified by a substantial governmental interest in procuring military manpower by a fairly and uniformly administered military draft system. In the case at bar, even if it were assumed that the burden on the Plaintiffs of reporting their belief may cause them to be excluded from a sitting jury, the "burden" is incidental and rationally justified by the substantial government interest.

With respect to the establishment clause, it is clear that a state church or religion is prohibited.[3] However, not every action by

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cannot be punished for blocking out the portion of his automobile license plate which has the motto "Live Free or Die"; as long as he left the license plate in a condition that served its auto identification purpose, he did not have to display a slogan endorsed by the state. Wooley v. Maynard, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977).

[3]The First Amendment provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Establishment and Free Exercise Clauses of the First Amendment apply to the states under the Fourteenth Amendment.

government that favors or benefits religion or the holding of religious belief is prohibited. The goal is a "benevolent neutrality" by the government respecting religion. Walz v. Tax Commission, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970).

Accordingly, it is established that despite the principle of separation of church and state, a state legislature can employ a chaplain and begin each legislative day with a prayer. Marsh v. Chambers, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 604 (1984). Similarly, a Christmas display in a public park is permissible. Lynch v. Donnelly, 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984). It should be noted that in Lynch v. Donnelly, the Court determined that there was no religious purpose in the practice, the primary effect was not to confer an impermissible benefit on religion, and the Christmas display did not impermissible (sic) entangle government and religious authorities.

This Court should engage in similar analysis: whether the practice has a secular purpose, a principal or primary effect that neither advances nor inhibits religion, and does not produce excessive government entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L.Ed.2d 745 (1971). There are two practices implicated in the Plaintiffs' Complaint; the juror oath and the jury information form.[4] The jury oath has the secular purpose of conferring an atmosphere of formality on the jury deliberation and putting persons on notice of the seriousness of the proceedings. The reference to God, or swearing by God, is incidental to the oath. Thus, the principal or primary effect of the oath does not advance or inhibit religion; it advances the jury system. Though there is a colorable argument that reminding persons that oaths are as serious as the mostly (sic) deeply held religious beliefs causes an entanglement by the government with religion, this argument is without merit. The oath is no more en-

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[4]Plaintiffs have raised for the second time in Federal Court the issue of the judicial oath. This issue has been decided as between these litigants in a previous litigation. In the alternative, even under the notice pleading standard in Federal Court, the reference to Judicial oath in the Complaint is insufficient to state a claim.

tangling than the reference to the deity in the pledge of allegiance and less entangling than a Christmas display, the inscription on legal tender "In God We Trust," or the payment out of the public treasury of religious leaders to serve in combat or convene the United States Congress. The jury oath does not violate the First Amendment establishment clause.

The jury information form, merely by requesting whether a person has a religious preference, is even less likely to give a state sanction to the holding of a religious belief. The secular purpose of the form has been discussed above. There is no primary effect which advances or inhibits religion. If an attorney relies on the information to exercise a strike on behalf of his client, there is only an incidental impact on the advancement or inhibition of the holding of a religious belief (or no religious belief) by a prospective juror. For the reasons stated above, there is no entanglement of any kind between the state and church.

For the foregoing reasons, the Court is of the opinion that Plaintiffs' Complaint does not state a cause of action under the United States Constitution for deprivation of protected interests or violation of the establishment clause of the First Amendment. Accordingly,

IT IS ORDERED that the cause is dismissed with prejudice as to the Federal claims. Any claims founded in state law appended to the federal claims in this cause are dismissed without prejudice.

SIGNED AND ENTERED, this, the 22nd day of March, 1989.

Lucius D. Bunton
Chief Judge

Appendix B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-11463

JON G. MURRAY, ET AL.,
A-89-CA 1463

v.

TRAVIS COUNTY DISTRICT COURT and JIM MATTOX,
Attorney General of the State of Texas,

Appeal from the United States District Court
for the Western District of Texas
(A-87-CV-489)

(February 26, 1990)

Before WISDOM, JOHNSON and DUHÉ, Circuit Judges.

JOHNSON, Circuit Judge:[5] The dismissal is affirmed for the reasons stated herein, and in the district court's opinion which is appended hereto. See Local Rule 47.6.

In so affirming the district court's order, we note that such a dismissal in no way contradicts the holding of our en banc Court in O'Hair v. White, 675 F.2d 680 (5th Cir. 1982). In White, this Court took a close and careful look at the jurisdictional basis for

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[5]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

O'Hair's claim in the federal court. Specifically, the Court inquired into whether O'Hair had standing to challenge the actions of the State of Texas in that case. As the Court noted, "the most fundamental aspect of the standing doctrine is that it focuses on the particular plaintiff seeking to bring his claim before the federal court, not on the issues or the merits of the case." Id. at 685. In a carefully drafted opinion, Judge Vance, writing for the majority, concluded that the plaintiffs alleged a sufficient injury and a sufficient causal connection to satisfy the constitutionally imposed requirements of standing. In so holding, however, the majority specifically noted that the Court did not "intimate any opinion as to whether the appellant has been deprived of any constitutional right or has been injured in any manner." Id. at 696. The Court emphasized that the decision was a narrow one which did not reach the merits of the claim.

In contrast in the instant case, the district court did not dismiss the plaintiffs' action because of a lack of standing. Rather, the district court dismissed the case because the plaintiffs failed to state a claim upon which relief can be granted. Specifically, the district court determined that because the right to serve on a jury is not a constitutionally protected one, the plaintiffs' cause of action had failed to state a claim. We agree. The occasion to serve on a jury is undeniably a duty, a privilege, and an opportunity for many citizens to actively and personally serve their government. Indeed, the opportunity for many citizens to serve on a jury might be the *only* opportunity they have to serve their government. Even so, jury service has not been construed as a constitutionally protected right. Moreover, as the plaintiffs concede, jurors are not required to swear an oath to a deity; rather, jurors are free to simply make an affirmation that the testimony which they are about to present will be the truth. An affirmation is no more than a solemn declaration made under the penalties of perjury. We do not consider, as plaintiffs would have us do, an affirmation to be the same as an oath to a deity.

Finally, in the context of plaintiffs' challenge to the question on the juror information card that asks for information regarding religion, we observe that atheism is indeed a relevant factor for the parties and attorneys involved in the jury selection process

— as much so as whether a potential juror is a Baptist, a Presbyterian or a Buddhist. Such information has undoubted relevance to the voir dire process and enables the parties, along with the bench and bar, to make informed and reasoned decisions when empaneling juries.

For these reasons, and those contained in the district court's opinion, we affirm.

AFFIRMED

Appendix C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-1463

JON G. MURRAY, ET AL.,
Plaintiffs-Appellants.

V.

TRAVIS COUNTY DISTRICT COURT and JIM MATTOX,
Attorney General of the State of Texas,
Defendants-Appellees.

Appeals from the United States District Court
for the Western District of Texas

Filed May 23, 1990

ORDER:

IT IS ORDERED that the motion of appellants to recall mandate is DENIED.

IT IS FURTHER ORDERED that the motion of appellants for this Court to vacate its prior opinion in this case and to reverse the district court's dismissal of their complaint is denied.

/s/Sam D. Johnson

SAM D. JOHNSON
UNITED STATES CIRCUIT JUDGE

Appendix D

Supreme Court of the United States

No. A-753

Jon G. Murray, et al.,

Petitioners

v.

Travis County District Attorney, et al

ORDER

UPON CONSIDERATION of the application of the petitioners,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including June 26, 1990.

/s/ Byron R. White

Associate Justice of the Supreme Court of the United States

Dated this 26th
day of April, 1990.